

RECOGNIZING PERSECUTION IN U.S. CRIMINAL JUSTICE AND  
CAPITAL PUNISHMENT: A POTENTIAL PATH TO ASYLUM  
RELIEF FOR U.S. NATIONALS

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Abstract

In 2020, amidst a global pandemic, political chaos, and economic recession, the killings of George Floyd and Breonna Taylor, among too many others, brought international attention and outrage to the institutionalized racism which characterizes the U.S. criminal justice system. In a country that claims itself “the leader of the free world,” people of color, and Black Americans in particular, are disproportionately policed, arrested, convicted, and, ultimately, executed in a deeply flawed capital punishment system. Asylum law may be an emerging option of relief from this discriminatory practice, especially with the current global support for reform movements. The closest the international community has come to addressing this complex issue are the Convention Against Torture extradition cases of *Burns* and *Soering*; however, these cases fail to address pervasive racial disparities. To date, there is very little discussion on the plausibility of acknowledging a U.S. national as a refugee. This Article discusses the potential recognition of racial discrimination within U.S. capital punishment as persecution warranting asylum relief under existing international law, while simultaneously exploring the capital punishment practices of the few other remaining retentionist states. Ultimately, this Article highlights the need for universal abolition to cure the inherent discrimination in death sentences.

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## INTRODUCTION

Since the release of the footage depicting the brutal 1991 assault on Rodney King at the hands of four Los Angeles police officers,<sup>1</sup> news of the beating and killing of Black Americans and the ensuing impunity for these crimes have sensationalized the media one after the other. Social media and the ability to record on a cellphone at any given moment has brought international attention to the U.S. criminal justice system's abuse of people of color, trends which marginalized communities have warned about for generations.

On top of a deadly pandemic and political chaos, the year 2020 also bore witness to the murders of George Floyd, Breonna Taylor, Rayshard Brooks, and Daniel Prude, among many others, whose killings at the hands of police while unarmed brought outrage from the international community.<sup>2</sup> Thanks to organizations like Black Lives Matter, founded in 2013 by three Black women organizers in response to the acquittal of

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1. Karen Grigsby Bates & Anjali Sastry, *When LA Erupted In Anger: A Look Back At The Rodney King Riots*, NPR (Apr. 26, 2017, 1:21 PM), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots> [<https://perma.cc/5AK7-4JX8>].

2. Jorge L. Ortiz, *'It's nothing but pain': The latest on the cases of violence against Black people that sparked America's racial reckoning*, USA TODAY (Sept. 9, 2020, 6:01 AM), <https://www.usatoday.com/story/news/nation/2020/09/09/george-floyd-breonna-taylor-jacob-blake-what-we-know/5753696002/> [<https://perma.cc/W47H-242G>].

teenager Trayvon Martin's killer,<sup>3</sup> greater attention has been brought to the racial disparities which continue to permeate every stage of the criminal justice process. Often glossed over and largely absent from the calls for reform is capital punishment, where these racial disparities are seen; perhaps most egregiously. Despite the plethora of empirical data demonstrating the arbitrary and discriminatory way in which death sentences are administered, legislatures and courts have refused to re-examine the race-neutral policies which fail to address these gross disparities.

The danger of executing the innocent often arises in capital punishment debates, but the possibility of such a catastrophe occurring is quickly dismissed due to unwavering faith in the U.S. criminal justice system. It is difficult for many Americans to believe that the United States would tolerate the possibility of executing its own innocent citizens, yet new evidence continuously emerges revealing that such catastrophes do in fact occur.<sup>4</sup> Of course, by the time this evidence is revealed, it is too late. As recently as August 21, 2019, Texas executed Larry Swearingen "despite significant flaws with virtually every piece of forensic evidence in his case and strong evidence that it was physically impossible for him to have committed the crime."<sup>5</sup> The danger of executing the innocent is ever-present in the United States today.

The criminal justice systems of countries such as Iraq, China, and Saudi Arabia are routinely criticized by human rights groups for operating harsh, cruel, inhumane, and torturous criminal justice systems.<sup>6</sup> These countries have developed a reputation across the international community for being complicit in the abuse and violation of their citizens' human rights.<sup>7</sup> It is hard to imagine the United States, commonly regarded as the leader of the free world, operating a justice system with anything in common with these notorious human rights violators. However, in the eyes of the increasingly abolitionist international

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3. *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> [<https://perma.cc/FMP7-CCBA>] (last visited Feb. 19, 2021).

4. *See Executed But Possibly Innocent*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executed-possibly-innocent#Pruett> [<https://perma.cc/57Z4-NBDR>] (last visited Feb. 9, 2021).

5. *Id.* at Larry Swearingen (noting that Swearingen was in jail on outstanding traffic warrants at the time that the victim, Melissa Trotter, was suspected to have been killed, and DNA from under her fingernails matched an unidentified male, excluding Swearingen).

6. *See Iraq: A Broken Justice System*, HUM. RTS. WATCH (Jan. 31, 2013, 9:57 AM), <https://www.hrw.org/news/2013/01/31/iraq-broken-justice-system#> [<https://perma.cc/SSS3-WXHP>]; *see also* The Editorial Board, *China's Broken Justice System*, N.Y. TIMES (Mar. 17, 2015), <https://www.nytimes.com/2015/03/18/opinion/chinas-broken-justice-system.html> [<https://perma.cc/DBA7-SJBM>]; *see also* Salma Abdelaziz, *Lashings, beheadings: Saudi's 'cherished' justice system*, CNN (Jan. 15, 2015, 11:25 AM), <https://www.cnn.com/2015/01/15/middleeast/saudi-arabia-justice/index.html> [<https://perma.cc/HS7W-KFQW>].

7. *See* cited sources, *supra* note 6.

community, the United States, as one of the leading death penalty states,<sup>8</sup> has joined these countries and other known human rights violators by continuing to tolerate the racial disparities in death sentences and the criminal justice system. A majority of the world has either completely abolished the use of capital punishment or no longer administers death sentences.<sup>9</sup>

Through treaties such as the International Covenant on Civil and Political Rights (ICCPR)<sup>10</sup> and the Convention Against Torture (CAT),<sup>11</sup> the international community has attempted to limit and restrain the use of capital punishment. Concrete abolitionist language condemning the use of the death penalty has yet to appear in any major resolution due to the diligence of the United States and its retentionist allies.

“The issue of the death penalty has clearly moved firmly into the human rights arena and is no longer accepted as simply a national criminal justice policy issue.”<sup>12</sup> The clearest evidence of this shifting trend is the recognition of substantial grounds to believe that the death penalty constitutes torture under Article 3 in the CAT extradition decisions of *Soering v. United Kingdom*<sup>13</sup> and *United States v. Burns*.<sup>14</sup>

8. Amnesty Int’l, *Death Sentences and Executions 2019*, AI Index ACT 50/1847/2020, at 52–53 (Apr. 21, 2020), [https://www.amnesty.org/download/Documents/ACT5018472020\\_ENGLISH.PDF](https://www.amnesty.org/download/Documents/ACT5018472020_ENGLISH.PDF) [<https://perma.cc/MT5Z-QFAL>] (noting in terms of the number of executions in 2019, the United States ranks the 6th highest out of 20 States, and in terms of the number of death sentences imposed in 2019, the United States ranks 13th out of 56 states) [hereinafter Amnesty Report 2019].

9. *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries> [<https://perma.cc/NB35-G7ER>] (last visited Feb. 9, 2021) (noting the total number of abolitionist countries, either in law or practice, is 142 while there are only 56 retentionist countries) [hereinafter *A & R Countries*].

10. International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, 999 U.N.T.S. 171, <https://www.refworld.org/docid/3ae6b3aa0.html> [<https://perma.cc/G3C8-WABU>] [hereinafter ICCPR].

11. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85, <https://www.refworld.org/docid/3ae6b3a94.html> [<https://perma.cc/7RE6-9KDW>] [hereinafter CAT].

12. INT’L BAR ASS’N, THE DEATH PENALTY UNDER INTERNATIONAL LAW: A BACKGROUND PAPER TO THE IBAHRI RESOLUTION ON THE ABOLITION OF THE DEATH PENALTY 6 (May 2006) (citing ROGER HOOD, *Capital Punishment: The USA in World Perspective*, in CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER: EXTRAJUDICIAL EXECUTIONS SERIES NO. 3 (2005)), <https://www.ibanet.org/medias/Deathpenalty-Paper.pdf?context=bWFzdGVyEhSSS1yZXBvcnRzfDElNjM3NnxhcHBsaWNhdGlvb9wZGZ8aDYzL2hmMy84ODAwNjgzNDkxMzU4L0RlYXRocGVuYWx0eV9QYXBleic5wZGZ8NGEzOWJiMTI1Yzk5YWI0YjJiZmM5ZGU1MzY4OWMwNzNiNjNmMTFOTIyOGE2OGNkZmQ5NmU2MWFmZGYxNWQzMw&attachment=true> [<https://perma.cc/KEL6-8ZKN>] [hereinafter IBA Paper].

13. *Soering v. U.K.*, App. No. 14038/88, ¶¶ 88, 91, 98 (July 7, 1989), <http://hudoc.echr.coe.int/eng/?i=001-57619> [<https://perma.cc/HDY5-CZZ8>].

14. *U.S. v. Burns*, [2001] S.C.R. 283, ¶ 53 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1842/index.do> [<https://perma.cc/9AEL-F5FG>].

These cases address an individual's right to life and humane treatment,<sup>15</sup> but fail to acknowledge the discriminatory nature of capital punishment that is characteristic of all retentionist countries, including the United States.<sup>16</sup> It is for this humanitarian reason that a new form of relief may be available for those seeking refuge from a death sentence—asylum. Although the European Union instituted a similar type of relief to those in fear of receiving a capital sentence (called “subsidiary protection”)<sup>17</sup> and Russia granted Edward Snowden temporary asylum after he was accused of committing treason against the United States,<sup>18</sup> a capital punishment-based asylum claim has yet to be officially recognized. To date, there has been little discussion on the feasibility of a successful U.S. national claiming permanent asylum.

With greater attention to the racial disparities in the U.S. criminal justice system than ever, the international community may recognize the requisite persecution for asylum relief in the discriminatory administration of the criminal justice system, and particularly, in capital punishment.

Part I of this Article will analyze the discriminatory capital punishment policies in the United States and other remaining retentionist countries. Part II will discuss the international community's attempts to restrict the use of capital punishment through the ICCPR and U.N. resolutions. Part III will explore the grounds for protection under the Convention Against Torture as interpreted in both *Soering* and *Burns*. Finally, Part IV will analyze the possibility for protection from the death

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15. *Soering v. U.K.*, App. No. 14038/88, at 45 (July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57619> [<https://perma.cc/4T5R-F6HP>] (De Meyer, J., concurring); *U.S. v. Burns*, [2001] S.C.R. 283, ¶¶ 58, 94 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1842/index.do> [<https://perma.cc/E3YZ-536Q>].

16. See generally Amnesty Int'l, *United States of America: Death by Discrimination – The Continuing Role of Race in Capital Cases*, AI Index AMR 51/046/2003, at 1 (Apr. 24, 2003), <https://www.amnesty.org/download/Documents/104000/amr510462003en.pdf> [<https://perma.cc/HH47-N789>]; Scott Phillips, *Racial Disparities in Capital Punishment: Blind Justice Requires a Blindfold*, AM. CONST. SOC'Y L. & POL'Y (2008), [https://www.acslaw.org/wp-content/uploads/2018/07/Phillips\\_Issue\\_Brief.pdf](https://www.acslaw.org/wp-content/uploads/2018/07/Phillips_Issue_Brief.pdf) [<https://perma.cc/RHY2-87YM>]; *Death Penalty and Race*, AMNESTY INT'L (May 18, 2017), <https://www.amnestyusa.org/issues/death-penalty/death-penalty-facts/death-penalty-and-race/> [<https://perma.cc/S5XA-PV6E>] [hereinafter *Death Penalty and Race*].

17. Council Directive 2004/83, art. 15, 2004 O.J. (L 304) 19 (EC), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF> [<https://perma.cc/YB8G-P24H>] (provides alternative protection for those threatened with serious harm by method of the death penalty or execution but does not recognize the individual as a refugee or victim of persecution) [hereinafter *Minimum Standards*].

18. Konstantin Toropin & Joel Williams, *Russia Extends Edward Snowden's Asylum To 2020*, CNN (Apr. 4, 2017, 2:52 PM), <https://www.cnn.com/2017/01/18/europe/russia-snowden-asylum-extension/index.html> [<https://perma.cc/PG78-6CTQ>] (Edward Snowden was not granted official asylum, but rather a form of discretionary and temporary safe haven).

penalty under asylum law, and address the issues of criminal bars, infringement of state sovereignty, and non-refoulement.

## I. DISCRIMINATION IN CAPITAL PUNISHMENT

### A. *Overview of Capital Punishment in the United States*

The United States seems to be unapologetically proud of its retentionist status as it is the only remaining G7 country that continues to utilize capital punishment,<sup>19</sup> and in the past eleven years has been the only country in the Americas to perform executions.<sup>20</sup> Between 2006 and 2016, the United States was featured as one of “the world’s top five executioners,” among China, Iran, Pakistan, and Saudi Arabia.<sup>21</sup> In 2016, executions in the United States unexpectedly fell and it now currently holds the sixth place position amongst the world’s top executioners.<sup>22</sup> This decrease in executions was partially due to due process appeals and concerns over the chemicals used for lethal injections.<sup>23</sup> For instance, in early January of 2016 the United States Supreme Court found that Florida’s sentencing procedures for capital crimes unconstitutionally violated due process because judges had the discretion to overrule non-unanimous jury decisions and still sentence the defendant to death.<sup>24</sup> This decision temporarily halted capital punishment in Florida, a state with one of the highest rates of executions,<sup>25</sup> and also caused the state to

19. Mary Lowth, *US Executions: Fight, Fudge, or Fold?*, 67 BRIT. J. GEN. PRAC. 564 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5697540/pdf/bjgpddec-2017-67-665-564.pdf> [<https://perma.cc/XV54-V86B>] (“The US is the only G7 country that executes convicted criminals”).

20. See Amnesty Report 2019, *supra* note 8, at 13 (noting “[f]or the 11th consecutive year, the USA was the only executioner in the Americas region . . .”); see also Sharon Pia Hickey, *The Death Penalty in 2016: Global Movement Toward Restricted Use of the Death Penalty*, CORNELL L. SCH.: CTR. ON THE DEATH PENALTY WORLDWIDE (Feb 6, 2017), <https://deathpenaltyworldwide.org/the-death-penalty-in-2016-trends-confirm-global-movement-toward-restricted-use-of-the-death-penalty/> [<https://perma.cc/6VGT-6NR4>]; *Death Penalty*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/death-penalty/> [<https://perma.cc/63DH-BCLD>] (last visited Feb. 19, 2021).

21. Amnesty Int’l, *Death Sentences and Executions 2016*, AI Index ACT 50/5740/2017, at 4, 11, 40 (Apr. 11, 2017), [https://www.amnesty.org/download/Documents/ACT5057402017\\_ENGLISH.PDF](https://www.amnesty.org/download/Documents/ACT5057402017_ENGLISH.PDF) [<https://perma.cc/XQ8V-U83X>] [hereinafter Amnesty Report 2016].

22. *Id.* at 11; Amnesty Report 2019, *supra* note 8, at 4.

23. Amnesty Report 2016, *supra* note 21, at 4.

24. *Hurst v. Florida*, 577 U.S. 92, 99, 102–03 (2016).

25. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR. (Nov. 9, 2017), <https://deathpenaltyinfo.org/number-executions-state-and-region-1976> [<https://perma.cc/Q43H-VE8Q>].

reevaluate over 100 death penalty cases in which a judge had ruled for the death penalty, despite the jury's non-unanimous decision.<sup>26</sup>

In *Furman v. Georgia*, a 1972 landmark decision, the United States Supreme Court found that the death penalty imposed in the two cases at bar violated both the Eighth and Fourteenth Amendments because it constituted cruel and unusual punishment and was administered in an arbitrary and discriminatory fashion.<sup>27</sup> The finding in *Furman* was only temporary because the Supreme Court reaffirmed the constitutionality of capital punishment four years later in *Gregg v. Georgia* due to new guidelines that would consider mitigating circumstances and mandatory appellate review of all capital sentences.<sup>28</sup> Since the reinstatement of the death penalty, the United States has executed 1,532 people.<sup>29</sup> Despite the Department of Justice's attempts to implement race-neutral policies, these egregious racial disparities remain in determining a death sentence, as will be discussed in Part II.B.<sup>30</sup>

Moreover, there are major civil rights concerns surrounding lethal injection as an execution method. The most common method of administering lethal injection is a three-drug protocol: (1) an anesthetic or sedative; (2) pancuronium bromide to induce muscle paralysis and respiratory failure; and (3) potassium chloride to stop the heart.<sup>31</sup> The purpose of the anesthetic is to keep the inmate from feeling the excruciating effects of the latter two drugs, which were compared to being "burned-alive" in front of the Supreme Court in the 2015 case *Glossip v. Gross*.<sup>32</sup> Within the past decade, a plethora of pharmaceutical companies have banned their products from being used in executions due to the serious questions that capital punishment raises.<sup>33</sup> The use of their

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26. Richard Perez-Pena, *Florida Ruling Upends More Than 100 Death Sentences*, N.Y. TIMES (Dec. 22, 2016), <https://www.nytimes.com/2016/12/22/us/florida-ruling-upends-more-than-100-death-sentences.html?mcubz=0> [<https://perma.cc/TGH2-Q8AV>] (last visited Aug. 17, 2021).

27. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972); U.S. CONST. amends. VIII, XIV (The Eighth Amendment prohibits cruel and inhumane punishment, while the Fourteenth Amendment applies that prohibition to all fifty U.S. states).

28. *Gregg v. Georgia*, 428 U.S. 153, 164, 195, 206–07 (1976).

29. *Executions Overview*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview> [<https://perma.cc/4ZNR-H25J>] (last visited Feb. 19, 2021).

30. See generally UNITED STATES DEPARTMENT OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (Sept. 12, 2000).

31. *Lethal Injection: Overview*, DEATH PENALTY INFO. CTR. (Feb. 11, 2006), <https://deathpenaltyinfo.org/lethal-injection> [<https://perma.cc/L57Y-RJK9>].

32. Tracy Connor, *Like Being 'Burned Alive': Execution Case Fires Up Supreme Court*, NBC NEWS (Apr. 29, 2015, 2:24 PM), <https://www.nbcnews.com/storyline/lethal-injection/supreme-court-must-decide-if-lethal-injection-too-painful-n349936> [<https://perma.cc/SGA3-KGQ2>].

33. See *LETHAL INJECTION: Manufacturer of Proposed Execution Drug Blocks Its Use*, DEATH PENALTY INFO. CTR. (Oct. 1, 2012), <https://deathpenaltyinfo.org/news/lethal-injection->

drugs for executions is contrary to their general mission to care for life. With the institution of these bans, the United States has had to get creative with substituting other drugs, often to the detriment of the inmates. In experimenting with new substitutions, some states have purposefully kept the sources of their lethal injection drugs secret,<sup>34</sup> to which the American Bar Association reacted by passing Resolution 108B, demanding that death penalty jurisdictions fully disclose “all relevant information regarding execution procedures” to the public.<sup>35</sup>

The reason for the pharmaceutical companies’ secrecy is because the stakes are high if a substituted drug fails. Since 2014, the substitution anesthetic midazolam has been the cause of several botched executions in which the inmates appeared to feel excruciating pain for extended periods of time before finally dying, violating the Eighth Amendment’s protection from cruel and unusual punishment.<sup>36</sup> The controversy over the use of midazolam for lethal injection reached peak publicity after the execution of Clayton D. Lockett on April 29, 2014 in Oklahoma, during which he “[writhed] on the gurney, [clenched] his teeth and [strained] to lift his head off the pillow” for forty-three minutes before being pronounced dead.<sup>37</sup> In response to Lockett’s torturous death, the Supreme Court found that an execution does not have to be free of *any* risk of pain in order to be constitutional under the Eighth Amendment.<sup>38</sup> The Court then refused to stay the executions of several other Oklahoma inmates, proclaiming that the petitioners’ claim might have been successful if they

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manufacturer-of-proposed-execution-drug-blocks-its-use [https://perma.cc/TW2Z-M2WZ]; *IACP Adopts Position on Compounding of Lethal Injection Drugs*, PHARMACY TIMES (Mar. 24, 2015), <https://www.pharmacytimes.com/view/iacp-adopts-position-on-compounding-of-lethal-injection-drugs> [https://perma.cc/WUQ7-LYVW] [hereinafter *Compounding Drugs*]; Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), [https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html?\\_r=0](https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html?_r=0) [https://perma.cc/3CGR-LFKY].

34. See, e.g., Wendy N. Davis, *States Keep Mum On Where Lethal Injection Drugs Are Made*, ABA J. (Mar. 1, 2014), [http://www.abajournal.com/magazine/article/states\\_keep\\_mum\\_on\\_where\\_lethal\\_injection\\_drugs\\_are\\_made/](http://www.abajournal.com/magazine/article/states_keep_mum_on_where_lethal_injection_drugs_are_made/) [https://perma.cc/7F5J-KH9L].

35. *Execution Transparency Resolution*, AM. BAR ASS’N, Policy No. 2015 MY 108B (2015), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/resources/dp-policy/execution-transparency-2015/](https://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/execution-transparency-2015/) [https://perma.cc/LAP9-8RUC].

36. See *Botched Executions*, DEATH PENALTY INFO. CTR. (updated Mar. 1, 2018), <https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions> [https://perma.cc/MJL3-SJS8] [hereinafter *Botched Executions*].

37. *Id.*

38. *Glossip v. Gross*, 576 U.S. 863, 869 (2015) (stating that “because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. *Ibid.* After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.”).



had presented an alternative execution method with a risk of pain that was proven to be significantly lower.<sup>39</sup>

Midazolam is only one of the causes of botched executions by lethal injection, which are startlingly common for a—supposedly—humane procedure. In fact, it has been reported that lethal injections have a botched execution rate of 7.12%.<sup>40</sup> Lack of medical experience seems to be a major cause of many botched executions, a majority of which seem to be caused by improper injection of the vein, an issue that could easily be alleviated with proper medical training.<sup>41</sup> Atul Gawande, M.D. of the Harvard School of Public Health is one of the many medical professionals with the opinion that these botched executions occur so frequently because trained medical professionals generally refuse to participate due to violations of medical ethics.<sup>42</sup> The American Medical Association Code of Medical Ethics explicitly prohibits physicians' involvement in executions; they may only verify the inmate's death after someone else has already declared it.<sup>43</sup> As a result, execution teams often have to improvise by training a lay-person with no prior medical experience.<sup>44</sup>

Despite all of these constitutional flaws, there are two major reasons why proponents of capital punishment continue to advocate for its retention: its deterrent effect and its economic/financial benefit. It is mistakenly believed by many that the death penalty deters criminals from committing crimes; specifically, murder. However, that belief has largely been falsified. In 2008, 88% of America's top criminologists determined that there is no correlation between deterrence and the death penalty based off of empirical, criminal data.<sup>45</sup> Some of that empirical research shows that states that have abolished the death penalty have lower murder rates annually than states who retain capital punishment.<sup>46</sup> In fact since

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39. *Id.* at 875, 877.

40. Botched Executions, *supra* note 36.

41. *Id.*

42. Atul Gawande, Lecture entitled *The Excellent Execution: Why Physicians Participate in Lethal Injection of Prisoners* at Harvard University: Edmond J. Safra Center for Ethics (Feb. 27, 2006) (Summary by Thomas Cochrane), <https://ethics.harvard.edu/event/excellent-execution-why-physicians-participate-lethal-injection-prisoners> [https://perma.cc/9HDX-C6VU].

43. Lee Black & Robert M. Sade, *Lethal Injection and Physicians: State Law vs Medical Ethics*, 298 J. AM. MED. ASS'N 2779 (2007).

44. Stephanie Mencimer, *State Executioners: Untrained, Incompetent, and "Complete Idiots,"* MOTHER JONES (May 7, 2014 10:00 AM), <http://www.motherjones.com/politics/2014/05/death-penalty-lethal-injections-untrained-doctors/> [https://perma.cc/39FJ-8U7D].

45. M. Radelet & T. Lacoock, *Do Executions Lower Homicide Rates? The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 489, 500–01 (2009), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7323&context=jclc> [https://perma.cc/2K4A-VVY5]

46. *See Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/deterrence-states->

the end of the 1990's, the murder rates in states that implement the death penalty have been anywhere between 48% and 101% higher than states that do not implement the death penalty.<sup>47</sup>

Many Americans appear to be under the impression that the death penalty is more cost-effective than a life sentence for capital crimes. For both federal and state courts, the costs of death penalty cases are greater than those in which the prosecution seeks a life sentence.<sup>48</sup> While the actual execution costs an estimated \$100 for the lethal injection chemicals,<sup>49</sup> the costs significantly accrue in the mandatory and extensive litigation and appeals process that is not required for life sentences without parole.<sup>50</sup> In a 2012 assessment of California's expenses on capital punishment, Judge Arthur Alarcon and Professor Paula Mitchell estimated pre-trial and trial costs to be \$1.94 billion; automatic appeals and state habeas corpus petitions cost \$925 million; federal habeas corpus appeals cost \$775 million; and the costs of incarceration for death row inmates alone cost \$1 billion.<sup>51</sup> Likewise, in the nine year period before New York abolished its death penalty, the state still spent \$170 million despite the fact that there were no executions.<sup>52</sup> California taxpayers were found to spend \$90,000 more per year to maintain each death row inmate than the amount spent for a prisoner in general population.<sup>53</sup>

Most disturbingly, miscarriages of justice and wrongful convictions are known to occur in capital cases. In a 1987 study, at least 350 erroneous convictions had been discovered and 40% of those innocent defendants had already been executed.<sup>54</sup>

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without-death-penalty-have-had-consistently-lower-murder-rates [https://perma.cc/J6UM-ENXR] (last visited Feb. 19, 2021).

47. *Id.*

48. *See State Studies on Monetary Costs*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/policy-issues/costs/summary-of-states-death-penalty> [https://perma.cc/3QAN-VKSB] (last visited Aug. 17, 2021).

49. Kelly Phillips Erb, *Considering The Death Penalty: Your Tax Dollars at Work*, FORBES (May 1, 2014, 12:12 AM), <https://www.forbes.com/sites/kellyphillipserb/2014/05/01/considering-the-death-penalty-your-tax-dollars-at-work/#1e52bf64664b> [https://perma.cc/8AQU-RH2F] (*noting* the Texas Department of Criminal Justice released information containing the costs of their lethal injection protocols at \$83 in 2011).

50. *See generally* Torin McFarland, *The Death Penalty vs. Life Incarceration: A Financial Analysis*, 7 SUSQUEHANNA U. POL. REV. 46 (2016).

51. A. Alarcon & P. Mitchell, *California Cost Study 2011; DPIC Study: Executing The Will Of The Voters?: A Roadmap To Mend Or End The California Legislature's Multi-Billion Dollar Death Penalty Debacle*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/california-cost-study-2011> [https://perma.cc/3LS2-KDH2] (last visited Aug. 18, 2021).

52. JOSEPH LENTOL ET AL., *THE DEATH PENALTY IN NEW YORK* (Apr. 3, 2015).

53. Alarcon & Mitchell, *supra* note 51.

54. Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23–24 (1987); *see also Criminal Justice Fact Sheet*, NAACP,

## B. Racial Disparity in the U.S. Criminal Justice System & Implementation of Capital Punishment

Due to over-policing of urban communities, Black Americans experience disproportionate levels of police contact despite “roughly equal rates across races” for minor offenses.<sup>55</sup> Hard on crime police policies such as the War on Drugs, “Broken Windows,” and “Stop, Question, and Frisk” have disproportionately targeted marginalized Black and Brown communities, which still experience historical and unaddressed segregation and poverty.<sup>56</sup> Despite making up approximately 13.4% of the population, Black Americans were equally as likely as whites to experience police-initiated contact in 2015 (11%), while Hispanics were 9% as likely.<sup>57</sup> In the estimated 53.5 million instances of police-initiated contact, “[B]lack (5.2%) and Hispanics (5.1%) were more likely to experience the threat or use of physical force than whites (2.4%).”<sup>58</sup>

Marginalized Black and Brown communities are also more likely to be searched, frisked and arrested during an instance of police-initiated contact.<sup>59</sup> “In 2016, [B]lack Americans comprised 27% of all individuals arrested in the United States—double their share of the total

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<https://www.naacp.org/criminal-justice-fact-sheet/> [<https://perma.cc/VD56-XJ87>] (last visited Feb. 19, 2021) (noting that Black Americans account for 47% of all wrongful conviction exonerations) [hereinafter Fact Sheet].

55. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/ZVP5-DQ4V>] [hereinafter SENTENCING PROJECT].

56. *Id.* (“What might appear at first to be a linkage between race and crime is in large part a function of concentrated urban poverty, which is far more common for African Americans than for other racial groups”); Fact Sheet, *supra* note 54.

57. Fact Sheet, *supra* note 54; ELIZABETH DAVIS ET AL., SPECIAL REPORT: CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, U.S. DEP’T OF JUSTICE 1 (2018), <https://www.bjs.gov/content/pub/pdf/cpp15.pdf> [<https://perma.cc/BN2K-NRKR>] [hereinafter DOJ REPORT 2015].

58. DOJ REPORT 2015, *supra* note 57; see generally Wendy Sawyer, *Visualizing the racial disparities in mass incarceration*, PRISON POL’Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/> [<https://perma.cc/QZ4U-KABQ>] (noting racial disparities in policing and arrests).

59. SENTENCING PROJECT, *supra* note 55 (noting that Black Americans are three times more likely to be searched when pulled over and twice as likely to be arrested despite a lower contraband hit rate while searching Black drivers than white drivers) (also noting that in 2020, Black Americans were 3.7 times more likely to be arrested for minor marijuana possession than whites, despite equal rates of drug offenses and the social distancing guidelines of the global COVID-19 pandemic); see also Jennifer L. Eberhardt & Rebecca C. Hetey, *The Numbers Don’t Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIRECTIONS PSYCH. SCI. 183 (2018), <https://journals.sagepub.com/doi/pdf/10.1177/0963721418763931> [<https://perma.cc/2PZ3-ERWX>] (“Once stopped, African Americans were significantly more likely to be handcuffed, searched and arrested”).

population.”<sup>60</sup> These patterns have been observed across the United States, notably in cities such as Boston, Los Angeles, New York City and Greensboro, North Carolina.<sup>61</sup>

Probably the area which has received the most attention in recent years, since the fatal 2014 shooting of teenager Michael Brown in Ferguson, Missouri, is racial disparity in police shootings.<sup>62</sup> Lack of diversity training and a focus on traumatizing, warrior style police training tactics are often cited as factors in the disproportionate number of fatalities amongst Black American males<sup>63</sup> from police shootings.<sup>64</sup> The studies arising out of the increased attention to the number and frequency of police shootings have found that in each of the past four

60. SENTENCING PROJECT, *supra* note 55, at 2.

61. AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, *BLACK, BROWN AND TARGETED: A REPORT ON BOSTON POLICE DEPARTMENT STREET ENCOUNTERS FROM 2007-2010* 4 (2014), <https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf> [<https://perma.cc/NTS8-DA6J>]; IAN AYRES ET AL., *A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT* 5–6 (2008), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf> [<https://perma.cc/MMU2-CE48>]; CHRISTOPHER DUNN ET AL., *STOP AND FRISK 2012: NYCLU BRIEFING 2* (2013), [https://www.nyclu.org/sites/default/files/publications/2012\\_Report\\_NYCLU\\_0.pdf](https://www.nyclu.org/sites/default/files/publications/2012_Report_NYCLU_0.pdf) [<https://perma.cc/GZN5-G6ZY>]; Sharad Goel et al., *Precinct Or Prejudice? Understanding Racial Disparities In New York City's Stop And Frisk Policy*, 10 *ANNALS APPLIED STAT.* 365, 366 (2016), [https://projecteuclid.org/download/pdfview\\_1/euclid.aos/1458909920](https://projecteuclid.org/download/pdfview_1/euclid.aos/1458909920) [<https://perma.cc/36DL-URG2>]; Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, *N.Y. TIMES* (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [<https://perma.cc/XRT2-3M5N>].

62. *August 9, 2014: Michael Brown is killed by a police officer in Ferguson, Missouri*, HISTORY.COM (Aug. 6, 2020), <https://www.history.com/this-day-in-history/michael-brown-killed-by-police-ferguson-mo> [<https://perma.cc/K547-RCE4>].

63. The numbers of female victims of police shootings are not as prevalent as they are for males, however, the racial disparities in female fatalities are also significant. *See generally* Frank Edwards et al., *Risk Of Being Killed By Police Use Of Force In The U.S. By Age, Race – Ethnicity And Sex*, 116 *PROC. NAT'L ACAD. SCI.* 16793 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6708348/pdf/pnas.201821204.pdf> [<https://perma.cc/4UGV-6S8G>] (This study collected data from the FE and National Vital Statistics System. The data collected involved all deaths involving police through systemic searches of online news coverage, public records, and social media, culminating in more comprehensive data on police-involved deaths than in official mortality files and a broader scope than similar unofficial documents. These sources have been endorsed as sound sources of data by the Bureau of Justice Statistics).

64. Ann Markusen, *Warrior or Guardian? How Police Training Fails Us*, MINN. POST (June 18, 2020), <https://www.minnpost.com/community-voices/2020/06/warrior-or-guardian-how-police-training-fails-us/> [<https://perma.cc/D98N-ZQLT>]; Seth W. Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014), <https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/> [<https://perma.cc/4RY3-BLV7>].

years, there was an average of 1,000 fatalities.<sup>65</sup> The racial makeup of these fatalities demonstrates that Black Americans face a greater risk of being killed by police over the course of their lives.<sup>66</sup> While “police violence is a leading cause of death for young men [in general] in the United States . . . one in every 1,000 black men can expect to be killed by police.”<sup>67</sup> Black men are also approximately 2.5 to 2.8 times more likely to be killed by police over the course of their lives than are white men.<sup>68</sup> Police shootings cause 1.6% of all deaths involving Black men between the ages of 20 and 24, whereas they account for 1.2% of Native American and Latino men’s deaths in this age group, and 0.5% for white and Asian/Pacific Islanders.<sup>69</sup>

Once in custody, Black Americans are more likely to be detained pretrial and denied bail due to socioeconomic disadvantages, criminal records, and the institutionalized perception that they are a greater flight and safety risk.<sup>70</sup> Black Americans are 5.9 times more likely to receive a harsher sentence, including a death sentence, than their white counterparts for similar crimes, while Hispanics are 3.1 times as likely.<sup>71</sup> These disparities in sentencing exist for both the most and least serious offenses.<sup>72</sup> For instance, over half (56.4%) of those serving life without

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65. Statista Rsch. Dep’t, *People shot to death by U.S. police, by race 2017-2021*, STATISTA (Mar. 31, 2021), <https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/> [<https://perma.cc/PE77-QAL5>] (noting that in the first three months of 2021, two hundred thirteen civilians were killed via police shooting).

66. See Edwards et al., *supra* note 63, at 16794, 16796–97.

67. *Id.* at 16793.

68. *Id.* at 16794.

69. *Id.* at 16795; see also Sarah DeGue et al., *Deaths Due to Use of Lethal Force by Law Enforcement*, 51 AM. J. PREV. MED. 173, Tbl. 8 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6080222/pdf/nihms-983593.pdf> [<https://perma.cc/ZD7R-65MW>] (noting that of those fatalities, black victims were the most likely to have been unarmed (14.8%), while whites and Hispanics were 9.4% and 5.8% likely to be unarmed).

70. SENTENCING PROJECT, *supra* note 55 (noting that “pretrial detention has been shown to increase the odds of conviction, and people who are detained awaiting trial are also more likely to accept less favorable plea deals, to be sentenced to prison, and to receive longer sentences”).

71. *Id.* (noting that these disparities in sentencing are also due in part to poor funding for defense programs and overworked public defenders, as well as drug free school zones disproportionately enforced in areas of high urban density); Death Penalty and Race, *supra* note 16 (noting that the American Bar Association recognized this racial disparity when it concluded in 2007 that a third of African Americans on death row in Philadelphia “would have received life sentences” if not for their race).

72. Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, CTR. FOR AMERICAN PROGRESS (May 10, 2019 9:03 AM), <https://www.americanprogress.org/issues/race/news/2019/05/10/469642/3-ways-1994-crime-bill-continues-hurt-communities-color/> [<https://perma.cc/F8NB-9NP4>] (noting that the Violent Crime Control and Law Enforcement Act of 1994 instituted a host of provisions, such as the three-strikes laws, that have disproportionately affected Black and Brown communities).

parole sentences are Black, 33.5% are white, and 7.4% are Hispanic.<sup>73</sup> Although Black and Latino Americans together only comprise 29% of the U.S. population, they make up for 57% of the U.S. prison population.<sup>74</sup>

These disparities are seen amongst female prisoners as well on a significant scale.<sup>75</sup> Additionally, as the American Bar Association has acknowledged, “[B]lack youth are arrested far out of proportion to their share of all youth in the U.S.”—commonly referred to as the School to Prison pipeline<sup>76</sup>—with 35% of all arrests under eighteen years old despite making up only 15% of the total population of this age group.<sup>77</sup>

The racial disparities throughout these phases of the criminal justice process partially explain why they show up perhaps most egregiously in capital punishment. Despite the extensive appeals process and consideration of mitigating circumstances instituted for the re-introduction of capital punishment in *Gregg*, these race-neutral policies fail to address the discrimination observed by the *Furman* Court. The ensuing racial disparities of the 1994 Crime Bill<sup>78</sup> have been well-documented in death penalty cases and show that “[i]n the five years after [the passage of the 1994 crime bill], 74% of defendants given death

73. Alison Walsh, *The Criminal Justice System Is Riddled With Racial Disparities*, PRISON POL’Y INITIATIVE (Aug. 15, 2016), <https://www.prisonpolicy.org/blog/2016/08/15/cjrace/> [<https://perma.cc/J2BT-FM2W>].

74. SENTENCING PROJECT, *supra* note 55; *see also* DeGue et al., *supra* note 69, at 8; PAUL GUERINO ET AL., PRISONERS IN 2010, U.S. DEP’T OF JUST. 27 (Dec. 2011), <https://www.bjs.gov/content/pub/pdf/p10.pdf> [<https://perma.cc/93RS-NPT2>] [hereinafter DOJ REPORT 2010]; KAREN R. HUMES, NICHOLAS A. JONES, & RAMIREZ, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, U.S. Census Bureau (Mar. 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> [<https://perma.cc/U8PL-TUJV>] [hereinafter CENSUS BRIEF 2010]; E. ANN CARSON, PRISONERS IN 2013, U.S. DEP’T OF JUST. 8 (Sept. 30, 2014), <https://www.bjs.gov/content/pub/pdf/p13.pdf> [<https://perma.cc/M4GF-AEEP>] (noting that Black men are incarcerated in state or federal prison at a rate six times higher than that of white men, and make up 40% of the prison population despite accounting for only 13% of Americans) [hereinafter DOJ REPORT 2013].

75. E. Ann Carson, *Prisoners in 2018*, U.S. DEP’T OF JUST. 15–16 (Apr. 30, 2020), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6846> [<https://perma.cc/Z9BK-MWAK>] [hereinafter DOJ REPORT 2018].

76. Libby Nelson & Dara Lind, *The School To Prison Pipeline, Explained*, JUST. POL’Y INST. (Feb. 24, 2015), <http://www.justicepolicy.org/news/8775> [<https://perma.cc/WVZ3-9G8M>]; *see also* SENTENCING PROJECT, *supra* note 55 (noting that “[a]s of 2001, one of every three black boys born in that year could expect to go to prison in his lifetime, as could one of every six Latinos – compared to one of every seventeen white boys”).

77. Sawyer, *supra* note 58; *see also* 2019 Crime in the United States: Table 43A Arrests by Race and Ethnicity, U.S. DEP’T OF JUST. (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-43> [<https://perma.cc/WVZ3-9G8M>] [hereinafter DOJ Table 43A]; *see also* Shasta N. Inman, *Racial Disparities in Criminal Justice*, AM. BAR ASSOC. (2020), [https://www.americanbar.org/groups/young\\_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-lawyers-can-help/](https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-lawyers-can-help/) [<https://perma.cc/VL4J-C34A>].

78. *See generally* Shannon, *supra* note 72.

penalty recommendations by federal prosecutors were people of color—44% of these defendants were Black and 21% were Hispanic.”<sup>79</sup> It should also be noted that the 1994 Crime Bill added sixty death penalty eligible federal offenses.<sup>80</sup>

Of the current number of inmates on death row, 55.5% are Black and Hispanic, despite accounting for only 31% of the total U.S. population together.<sup>81</sup> Black Americans alone account for 42% of the death row population.<sup>82</sup> In three of the jurisdictions which disproportionately apply the death penalty, Texas, Virginia<sup>83</sup> and the Eastern District of Missouri, “more than 90% of individuals on death row are people of color.”<sup>84</sup> According to the American Civil Liberties Union, people of color have disproportionately been sentenced to death and executed, accounting for 43% of total executions since 1976, and 55% of the population currently waiting on death row.<sup>85</sup> A 2006 study in Philadelphia found that “the more stereotypically Black a defendant [was] perceived to be, the more likely that person [would] be sentenced to death.”<sup>86</sup> Additionally, the American Bar Association concluded in 2007 that a third of African Americans on death row in Philadelphia would have received life sentences if not for their race.<sup>87</sup> Nationally, over the last 40 years Black Americans have accounted for a startling 35% of individuals executed via the death penalty despite accounting for only 13% of the total population.<sup>88</sup>

The victim’s race further demonstrates the arbitrary nature in which death sentences are given, and also seems to be a factor in which

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79. *Race and the Death Penalty*, NAT’L ASS’N CRIM. DEF. L., <https://www.nacdl.org/Content/Race-and-the-Death-Penalty> [<https://perma.cc/ACA7-5XXB>] (last visited Feb. 19, 2021) (citing Shannon, *supra* note 72) [hereinafter NACDL].

80. Shannon, *supra* note 72.

81. Sawyer, *supra* note 58.

82. *Id.*

83. On February 5, 2021, the Virginia legislature unexpectedly voted to abolish the state’s death penalty due, in part, to the pervasive racial disparities. See Whitney Evans & David Streever, *Lawmakers in Virginia Vote to Abolish the Death Penalty*, NPR (Feb. 5, 2021), <https://www.npr.org/2021/02/05/964514242/lawmakers-in-virginia-vote-to-abolish-the-death-penalty> [<https://perma.cc/2FAC-SNAL>] (“Opponents of the death penalty cite the high cost, the possibility of executing the innocent, and the disproportionate racial impact. Almost half of the people Virginia executes are Black, although Black residents only account for roughly 20% of the state’s population”). There is no indication that this is a trend that will be seen throughout the remaining pro-death penalty states and the federal government.

84. NACDL, *supra* note 79.

85. *Race and the Death Penalty*, AM. C.L. UNION, <https://www.aclu.org/other/race-and-death-penalty> [<https://perma.cc/4LGF-TV2L>] (last visited Feb. 9, 2021).

86. NACDL, *supra* note 79 (citing Lisa Trei, ‘Black’ Features Can Sway In Favor Of Death Penalty, *According To Study*, STANFORD REPORT (May 3, 2006), <https://news.stanford.edu/news/2006/may3/deathworthy-050306.html> [<https://perma.cc/3BVT-LH3X>]).

87. Death Penalty and Race, *supra* note 16.

88. Fact Sheet, *supra* note 54.

defendants receive the death penalty and which defendants receive a life sentence.<sup>89</sup> Several studies have found that Black Americans are more likely to receive the death penalty than whites when convicted for similar crimes under similar facts. Between 1977 and 2003, 203 black inmates were executed for inter-racial murders, while only 31 white inmates were executed for inter-racial murders of the same magnitude.<sup>90</sup> In 2014, a study conducted in Washington State found “that jurors are three times more likely to recommend a death sentence for black defendants than for a white defendant in a similar case.”<sup>91</sup>

Former Supreme Court Justice Harry A. Blackmun, in his dissent from the Court’s decision in *Callins v. Collins* (1994), wrote that “[e]ven under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die.”<sup>92</sup> Despite the copious amounts of evidence of the gross racial disparities in death penalty sentences, this is an area of the criminal justice system that is often looked over in the calls for reform and serious action by legislatures or the judiciary to address these racial disparities remains to be seen.

### C. Capital Punishment Abroad

Only 56 countries maintain the use of the death penalty compared to the 142 countries that are either completely abolitionist or are abolitionist in practice.<sup>93</sup> As of 2019, China, Egypt, Iran, Iraq, and Saudi Arabia, are the world’s top five executioners, with the United States following in sixth place.<sup>94</sup> In 2015, Amnesty International recorded the highest number of global executions since 1989.<sup>95</sup> Although 2016 saw the start of a significant decrease with 1,032 estimated executions overall, that

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89. Amnesty Int’l, *United States of America – Killing with Prejudice: Race and the Death Penalty in the USA*, AI Index AMR 51/52/99, 6–7 (May 1999), <https://www.amnesty.org/en/wp-content/uploads/2021/06/amr510521999en.pdf> [<https://perma.cc/Y9CR-B3T6>] (“[N]on-judicial variables are particularly pronounced when the race of the defendant is linked to that of the victim.”).

90. *Race*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/race> (last visited Feb. 9, 2021); see generally SCOTT PHILLIPS, RACIAL DISPARITIES IN CAPITAL PUNISHMENT: BLIND JUSTICE REQUIRES A BLINDFOLD (2008), [https://www.acslaw.org/wp-content/uploads/2018/07/Phillips\\_Issue\\_Brief.pdf](https://www.acslaw.org/wp-content/uploads/2018/07/Phillips_Issue_Brief.pdf) [<https://perma.cc/2JZD-NWXM>].

91. NACDL, *supra* note 79 (citing *STUDIES: Jurors in Washington State More Likely to Impose Death on Black Defendants*, DEATH PENALTY INFO. CTR. (Feb. 25, 2014), <https://deathpenaltyinfo.org/news/studies-jurors-in-washington-state-more-likely-to-impose-death-on-black-defendants> [<https://perma.cc/4YX7-VES7>]).

92. *Callins v. Collins*, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting).

93. *A & R Countries*, *supra* note 9.

94. *Executions Around the World*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/international/executions-around-the-world> [<https://perma.cc/TF3F-Q79A>] (last visited Feb. 19, 2021).

95. Amnesty Report 2016, *supra* note 21, at 4.



figure was still higher than the average recorded in the past decade.<sup>96</sup> Global trends since 2016 demonstrate that the number of confirmed executions have been declining.<sup>97</sup> Amnesty International reports that “[a]t least 657 executions were carried out in 2019 compared to 2018 when at least 690 occurred, representing a 5% drop.”<sup>98</sup> The true number of annual executions is estimated to be at least a few thousand higher as many retentionist states refuse to give an accurate report.<sup>99</sup> Although executions decreased significantly in Egypt, Iran, Japan, and Singapore, the numbers increased in Iraq, Saudi Arabia, South Sudan and Yemen.<sup>100</sup>

However, China is inarguably the world’s top executioner with an execution rate higher than all other retentionist countries combined.<sup>101</sup> Although the official number of executions carried out each year is kept secret by the Chinese government, human rights organizations estimate that anywhere from 1,000 to 2,000 yearly executions are carried out on average.<sup>102</sup> Human rights organizations such as Amnesty International have demanded that the Chinese government be open about the number of executions, with Amnesty’s Secretary General, Salil Shetty stating that the “Chinese government has recognized it is a laggard in terms of openness and judicial transparency, but it persists in actively concealing the true scale of executions. It is high time for China to lift the veil on this deadly secret and finally come clean about its death penalty system.”<sup>103</sup> China’s Supreme People’s Court only instituted the mandatory review of death sentences as recently as 2007.<sup>104</sup> This development has done little, however, to curb the massive number of annual executions. Dui Hua, the leading Chinese human rights and criminal justice reform organization, estimates that as recently as 2017

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96. *Id.*

97. Amnesty Report 2019, *supra* note 8, at 7; *see also* IBA Paper, *supra* note 12, at 9–10 (noting that an average of three countries per year abolish the death penalty).

98. Amnesty Report 2019, *supra* note 8, at 8.

99. *Id.*

100. *Id.* at 8–9 (noting that Iran’s decrease in executions is due in part to its 2017 anti-narcotics law amendments).

101. James Griffiths, *China Is The World’s Top Executioner, But It Doesn’t Want You To Know That*, CNN (Apr. 7, 2016, 3:28 PM), <http://www.cnn.com/2016/04/06/asia/china-death-penalty/index.html> [<https://perma.cc/CL2W-4LUK>].

102. *See* Death Penalty Worldwide, *Death Penalty Database: People’s Republic of China (China)*, CORNELL L. SCH. (Apr. 10, 2014), <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=China>; *see also* *Criminal Justice: Death Penalty Reform*, DUI HUA, <https://duihua.org/resources/death-penalty-reform/> [<https://perma.cc/W42M-SEJM>] (last visited Feb. 19, 2021) [hereinafter *Dui Hua*].

103. *Death Penalty: World’s Biggest Executioner China Must Come Clean About “Grotesque” Level of Capital Punishment*, AMNESTY INT’L (Apr. 11, 2017), <https://www.amnesty.org/en/press-releases/2017/04/china-must-come-clean-about-capital-punishment/> [<https://perma.cc/W2HN-PDST>] [hereinafter *World’s Biggest Executioner*].

104. DUI HUA, *supra* note 102.

and 2018, China was executing approximately 2,000 people annually.<sup>105</sup> Unlike the extensive appellate review process provided for American death row inmates, the average Chinese death row inmate waits only two months before their execution.<sup>106</sup> This makes error even more likely than in the U.S. capital punishment system.

The U.S. is among only a few of the remaining retentionist countries that has only implemented the death penalty for capital murder in recent years.<sup>107</sup> Amnesty International reports the five global crimes which are likely to receive punishment by death if convicted: consensual sexual relations outside marriage, drug trafficking, white-collar crimes, political opposition to the government, and offending or abandoning religion.<sup>108</sup> Seven retentionist countries, including Sudan and Iran, punish adultery by stoning the defendant to death.<sup>109</sup>

Drug trafficking is becoming more harshly prosecuted around the world. In 2019, Indonesia imposed sixty death sentences for drug trafficking, 75% of all capital sentences.<sup>110</sup> Similarly in Malaysia, 69% of death penalty sentences were imposed for drug trafficking offenses, totaling eighteen sentences.<sup>111</sup> Punishing drug trafficking with death is not a new phenomenon. In 2012, half of all death sentences in Thailand were given for drug trafficking offenses, and in Saudi Arabia 22 out of the 79 executions that year were conducted for drug trafficking.<sup>112</sup>

Not even Western tourists are safe from the death sentence under the strict and uncompromising drug trafficking laws that many retentionist countries employ, as evidenced by the case of Laura Plummer.<sup>113</sup> In 2017, Plummer, a British tourist, was arrested at the Hurghada International Airport in Egypt when she was found to be carrying prescription painkillers which were legal in the UK but illegal in Egypt.<sup>114</sup> Her lawyer

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105. *Id.*

106. *Id.*

107. See generally, *Crimes Punishable by Death*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death> [https://perma.cc/98H5-8WW4] (last visited Aug. 18, 2021).

108. *Five 'Crimes' That Can Get You Killed*, AMNESTY INT'L (Apr. 15, 2013), <https://www.amnesty.org/en/latest/news/2013/04/five-crimes-can-get-you-killed/> [https://perma.cc/K5P7-8SDL] [hereinafter *Five 'Crimes'*].

109. See *id.*; see also *Sudan: Ban Death by Stoning*, HUM. RTS. WATCH (May 31, 2012, 10:35 AM), <https://www.hrw.org/news/2012/05/31/sudan-ban-death-stoning> [https://perma.cc/8UGS-PZNM].

110. Amnesty Report 2019, *supra* note 8, at 25.

111. *Id.* at 27.

112. *Five 'Crimes,' supra* note 108.

113. Simon Calder & Samuel Osborne, *Laura Plummer: British tourist jailed for three years for carrying painkillers into Egypt, family says*, INDEPENDENT UK (Dec. 26, 2017, 11:00 GMT), <http://www.independent.co.uk/news/world/middle-east/laura-plummer-british-egypt-tourist-jailed-three-years-painkillers-tramadol-a8128626.html> [https://perma.cc/6SFM-GYAM].

114. *Id.*

informed her that she could receive anywhere from a three year imprisonment to a capital sentence.<sup>115</sup> Until her release in 2019, Plummer was detained in conditions that Karl Turner, the Labour MP for Hull East, described as taking a serious toll on both her mental and physical health.<sup>116</sup>

With this background information on global administration of capital punishment to compare with the United States,' we next look at the existing international law limiting death sentences.

## II. INTERNATIONAL LAW LIMITING CAPITAL PUNISHMENT

The international community's pursuit of universal abolition began as early as 1929 with the drafting of the Geneva Convention Relative to the Treatment of Prisoners of War.<sup>117</sup> Although it was non-binding, the Convention became the first codified limitation on capital punishment when it restricted the use of executions for prisoners of war who were captured during armed conflict.<sup>118</sup> Nearly a century later, the international community continues its quest to limit the death penalty through international treaties; however, it maintains a fine line between limitation and outright abolishment. The language of capital punishment-related treaties is carefully constructed so as not to discourage retentionist countries from ratification.<sup>119</sup> Retentionist countries tend to put up a fight when they perceive even a hint of abolitionist language.<sup>120</sup>

An international mandate for universal abolition has yet to be ratified, and even if such a mandate were created, it would most likely be non-binding. However, there have been several smaller victories during the unmistakable trend towards universal abolition.<sup>121</sup> The most prominent of such victories is Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which is strongly suggestive of an abolitionist position.<sup>122</sup> The ICCPR further prohibited executions to even more

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115. *Id.*

116. *Id.*; see also Laura Plummer: Jailed Briton in Egypt 'released,' BBC NEWS (Jan. 28, 2019), <https://www.bbc.com/news/uk-england-humber-47025773> [<https://perma.cc/K6KR-DEMY>].

117. Geneva Convention Relative to the Treatment of Prisoners of War art. 100–01, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

118. *Id.*

119. See IBA Paper, *supra* note 12, at 9; see also WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 367 (3rd Edition: Cambridge UP, 2002).

<sup>120</sup> See generally, *id.*

121. SCHABAS, *supra* note 119, at 364, 377.

122. ICCPR, *supra* note 10, art. 6. See also *Death Penalty*, UNITED NATIONS HUMAN RIGHTS: OFF. HIGH COMM'R, <http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIIndex.aspx> [<https://perma.cc/CZP6-FYMU>] (last visited Feb. 9, 2021) [hereinafter *Death Penalty*]; Laurence E. Rothenberg, *International Law, US Sovereignty and the Death Penalty*, GEORGETOWN J. OF INT'L L. 547, 550–51 (2004).

limiting circumstances than the former Geneva Convention, but also maintained that “nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”<sup>123</sup>

Perhaps it was this language in the ICCPR which has contributed to more than two-thirds of countries worldwide to completely abolish the death penalty.<sup>124</sup> The year 1976 began the wave of countries that would completely abolish capital punishment for all crimes, starting with Portugal and ending with Sierra Leone in 2021.<sup>125</sup> By the mid-1990s, the majority of the world was abolitionist.<sup>126</sup> The Office of the High Commissioner for Human Rights (OHCHR) reports that approximately 170 U.N. Member States with a variety of political, cultural, and religious values have either abolished the death penalty or are abolitionist in practice.<sup>127</sup> Ironically, this wave of abolition began during the same year that the United States reinstated the constitutionality of the death penalty.<sup>128</sup> The number of abolitionist countries continues to increase rapidly with approximately three countries abolishing capital punishment per year.<sup>129</sup>

The ICCPR also provides for several other limitations: the inherent right to life; the imposition of the death penalty only for the most serious crimes; the right of the condemned to seek pardon; and the restriction on sentencing pregnant women and children under eighteen years old to death.<sup>130</sup> Article 6 of the ICCPR clarifies that no person shall be “arbitrarily deprived” of the right to life,<sup>131</sup> a phrase that has been interpreted by the Human Rights Committee<sup>132</sup> to mean that all capital

123. ICCPR, *supra* note 10, art. 6. *See also Death Penalty*, *supra* note 122.

124. *Death Penalty 2015: Facts and Figures*, AMNESTY INT’L (Apr. 6, 2016, 6:05 PM), <https://www.amnesty.org/en/latest/news/2016/04/death-penalty-2015-facts-and-figures/> [<https://perma.cc/XN6B-FSDV>].

125. *Countries That Have Abolished the Death Penalty Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976> [<https://perma.cc/NA27-25TA>] (last visited Mar. 13, 2021); *Sierra Leone Becomes 23<sup>rd</sup> African Country to Abolish the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/news/sierra-leone-becomes-23rd-african-country-to-abolish-the-death-penalty> [<https://perma.cc/4LE8-NDQV>] (last visited Aug. 18, 2021).

126. IBA Paper, *supra* note 12, at 9.

127. *Death Penalty*, *supra* note 122.

128. *Gregg*, 428 U.S. at 169, 190–92, 198 (the Supreme Court found that capital punishment did not violate the Eighth Amendment with the addition of mandatory appeals and a separate sentencing trial).

129. IBA Paper, *supra* note 12, at 9.

130. ICCPR, *supra* note 10, art. 6(1), (2), (4), and (5).

131. ICCPR, *supra* note 10, art. 6(1).

132. The Human Rights Committee should not be confused with the Human Rights Council, which serves as a subsidiary body to the U.N. General Assembly. Any findings by the Human Rights Committee are generally used for persuasive purposes.

sentencing procedures must meet the provisions of the ICCPR and be free of any human rights violations.<sup>133</sup> Several requirements of capital trials include providing information for the defendant in their own language, a presumption of innocence, sufficient time for preparation and to seek counsel, an impartial tribunal, and a review of the trial by a higher tribunal.<sup>134</sup> These requirements were adopted by the United Nations after *Reid v. Jamaica* found the trial of the petitioner who received a capital sentence was unfair and in breach of Article 6 of the Covenant.<sup>135</sup>

The international community has worked diligently to reserve capital punishment for only the most serious crimes as suggested by the ICCPR. Since 2007, the United Nations General Assembly (UNGA) has adopted seven resolutions aimed to reduce the number of offenses that are eligible to receive a death sentence.<sup>136</sup> Despite these efforts, drug crimes, adultery, political and religious opposition, and sexual orientation remain grounds for capital punishment in many retentionist countries. This does not seem comparable with “the most serious crimes” language mandated in the ICCPR.<sup>137</sup> One of the UNGA’s most recent attempts to curb states’ use of capital punishment aimed to ban the death sentence for crimes of same-sex relations.<sup>138</sup> The resolution ultimately passed with twenty-seven nations voting in favor; however, thirteen nations, including the United States, voted against the passing of the resolution.<sup>139</sup>

The ban on sentencing children under eighteen, or those who were under eighteen when the alleged crime was committed, death is recognized as a peremptory norm of customary international law.<sup>140</sup> In addition to Article 6 of the ICCPR, the U.N. Convention on the Rights of the Child and the American Convention on Human Rights both prohibit

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133. See ICCPR, *supra* note 10, art. 6(1); High Comm. Hum. Rts., Louise Arbour, *In the Matter of Sentencing Taha Yassin Ramadan*, ¶ 18 (Feb. 8, 2007), <http://online.wsj.com/public/resources/documents/tribunal20070207.pdf> [<https://perma.cc/J6HT-ZQUF>].

134. IBA Paper, *supra* note 12, at 5.

135. *Reid v. Jamaica*, No. 250/1987, ¶ 11, U.N. Doc. CCPR/C/51/D/355/1989 (Aug. 21, 1990).

136. *Death Penalty*, *supra* note 122.

137. ICCPR, *supra* note 10, art. 6(2).

138. Human Rights Council Res. 36/6 U.N. Doc. A/HRC/36/L.6, ¶ 6 (Sept. 22, 2017).

139. HRC Staff, *Trump Administration Explains Vote Against United Nations Resolution*, HUM. RTS. CAMPAIGN (Oct. 3, 2017), <https://www.hrc.org/blog/trump-admin-votes-against-resolution-condemning-death-penalty-for-same-sex> [<https://perma.cc/X8KX-NYXL>].

140. *Juveniles*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/execution-juveniles-us-and-other-countries> [<https://perma.cc/4Z8N-CCL7>] (last visited Feb. 19, 2021); see also William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH & LEE L. REV. 797, 813 (1998), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1517&context=wlulr> [<https://perma.cc/M5MB-8DYG>].

the execution of juveniles as a violation of human rights.<sup>141</sup> Despite these monumental international treaties, today, children receive capital sentences and are the subjects of executions, in many cases for a crime other than murder.<sup>142</sup> Even with the abolition of the death penalty for juveniles signed into international law, the actual execution of such treaties is extremely slow-moving, as demonstrated by the United States having only declared the execution of juveniles to be unconstitutional as recently as 2005.<sup>143</sup>

There are several other international limitations on the death penalty that have been gaining momentum. For instance, executing pregnant women has been almost universally banned as proscribed under the ICCPR, except for in Saint Kitts and Nevis.<sup>144</sup> In some countries, such as Papua New Guinea, a pregnant woman can be spared from execution if she so requests.<sup>145</sup> In the alternative, the woman will not be executed until after she gives birth.<sup>146</sup> Additionally, specific international human rights treaties have banned the execution of women with dependent, young children.<sup>147</sup> There is also a growing trend towards the prohibition of execution of the mentally handicapped.<sup>148</sup> Even methods of execution have begun to trend towards more humane treatment in the remaining retentionist countries.<sup>149</sup> The Human Rights Committee has found gas chambers, public executions, and stoning to constitute cruel, inhumane, and degrading treatment in violation of Article 1 of the Convention Against Torture.<sup>150</sup> When the recording of Saddam Hussein's execution was released, it was internationally criticized due to the crowd that could be heard audibly mocking him in his final moments.<sup>151</sup> Execution by

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141. See G.A. Res. 44/25, Convention on the Rights of the Child, art. 9, ¶ 4 (Nov. 20, 1989); see also Organization of American States, American Convention on Human Rights, art. 4, ¶ 5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

142. See *Iran Is Sentencing Children And Teenagers To Death*, AMNESTY INT'L (Jan. 12, 2018, 7:31 AM), <https://www.amnesty.org.uk/iran-juvenile-offenders-death-row-execution> [<https://perma.cc/W5HJ-ZXEU>]; see also *Iran: Two 17-Year-Old Boys Flogged And Secretly Executed In Abhorrent Violation Of International Law*, AMNESTY INT'L (Apr. 29, 2019), <https://www.amnesty.org/en/latest/news/2019/04/iran-two-17yearold-boys-flogged-and-secretly-executed-in-abhorrent-violation-of-international-law/> [<https://perma.cc/WP47-JZZ9>].

143. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

144. *Women*, CORNELL L. SCH.: CTR. ON THE DEATH PENALTY WORLDWIDE (Jan. 25, 2012), <https://deathpenaltyworldwide.org/publication/women/?version=html> [<https://perma.cc/SC9W-ZNS3>].

145. *Id.*

146. *Id.*

147. *Id.*

148. IBA Paper, *supra* note 12, at 4; see also *Ford v. Wainwright*, 477 U.S. 399, 401, 417 (1986).

149. IBA Paper, *supra* note 12, at 6.

150. *Id.*

151. *Id.*

stoning receives its own criticism for being an inhumane and torturous form of punishment because the rocks are purposely limited in size so that the condemned has to endure a longer period of suffering before death.<sup>152</sup> Even with all this guidance and criticism from the international community, there has yet to be any codified, binding restrictions on many of these capital punishment practices.

Despite the global trend towards universal abolition, the Third Committee of the UNGA for Social, Humanitarian, and Cultural Matters (Third Committee) clarified that international law does not prohibit the death penalty.<sup>153</sup> With the United States leading the forefront, the few remaining retentionist countries have fought hard to keep abolitionist language out of any international resolutions.<sup>154</sup>

### III. CONVENTION AGAINST TORTURE RELIEF FOR CAPITAL PUNISHMENT

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted and ratified by the UNGA on December 10, 1984.<sup>155</sup> Article 1 of CAT defines “torture” as meaning:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>156</sup>

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152. *Id.*

153. Press Release, Third Comm. of the U.N. General Assembly, Capital Punishment Not Prohibited Under International Law, Third Committee Told, U.N. Press Release GA/SHC/3897 (Oct. 30, 2007), <https://www.un.org/press/en/2007/gashc3897.doc.htm> [<https://perma.cc/22KZ-5S82>].

154. See Frida Ghitis, *The Shocking US Vote Not To Condemn The Death Penalty For LGBT People*, CNN (Oct. 5, 2017, 2:30 PM), <http://www.cnn.com/2017/10/05/opinions/un-death-penalty-resolution-usa-lgbt-ghitis-opinion/index.html> [<https://perma.cc/9RB3-BYBH>]; Press Release, Third Comm. of the U.N. General Assembly, Third Committee Approves Six Drafts on Strengthening Elections, Migrants Rights, amid Discord Over References to International Criminal Court, Poll Observance, U.N. Press Release GA/SHC/4219 (Nov. 9, 2017), <https://www.un.org/press/en/2017/gashc4219.doc.htm> [<https://perma.cc/DC38-7TQQ>] (noting Japan voices concern over discussions of including abolitionist language in the draft).

155. CAT, *supra* note 11.

156. *Id.* art. 1(1).

Many of the world's top executioners, including China, Egypt, Iraq, Saudi Arabia, and the United States, ratified this definition of torture.<sup>157</sup> No court has gone so far as to conclude that a retentionist state's capital punishment practices constitute torture in violation of this definition under CAT. However, a few abolitionist countries created a basis for protection from capital punishment under Article 3 of CAT without explicitly finding instances of state-mandated torture. Article 3 provides: "No State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>158</sup> States are to rely on "pattern[s] of gross, flagrant or mass violations of human rights" in determining whether there are grounds to refuse extradition.<sup>159</sup>

In *Soering v. The United Kingdom*, the European Court of Human Rights found that Article 3 of CAT prohibited the extradition of German citizens to the United States where they may face capital punishment.<sup>160</sup> Even with assurances from the United States that the prosecution would not seek the death penalty, the Court found that these assurances were not enough to protect the defendants' right to a life free from cruel and inhumane treatment.<sup>161</sup> The Canadian Supreme Court paralleled the *Soering* reasoning in *United States v. Burns* when it refused to extradite two suspects to the United States without assurances that the prosecution would not seek the death penalty.<sup>162</sup> However, the *Burns* Court ultimately allowed for the extradition of the defendants after being satisfied by subsequent assurances.<sup>163</sup>

*Soering* and *Burns* cite to several factors in their ultimate conclusion that capital punishment constitutes "substantial grounds" under Article 3: the international trend towards universal abolition, the potential for wrongful conviction, the permanency of an execution, and the cruel and inhumane nature of the "death row phenomenon."<sup>164</sup> Both cases discuss

157. *Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en) [<https://perma.cc/4DH6-N6DB>] (last visited Aug. 18, 2021).

158. CAT, *supra* note 11, art. 3(1).

159. *Id.* art. 3(2).

160. *Soering v. U.K.*, App. No. 14038/88, ¶ 126 (July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57619> [<https://perma.cc/L676-K8XQ>].

161. *Id.* at 6, 46 (De Myer, J., concurring).

162. *U.S. v. Burns*, [2001] S.C.R. 283, ¶ 53 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1842/index.do> [<https://perma.cc/T8QE-3AB4>].

163. See, e.g., Peter Bowai & Preet Saini, *Whatever Happened to U.S. v. Burns: Extradition and the Death Penalty*, *LAWNOW* (May 7, 2015), <http://www.lawnow.org/whatever-happened-us-v-burns-extradition-death-penalty/> [<https://perma.cc/B2WU-79V5>].

164. *Soering v. U.K.*, App. No. 14038/88, ¶¶ 81, 103 (July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57619> [<https://perma.cc/9ZW3-XU4Z>]; *U.S. v. Burns*,



how condemned inmates often wait multiple decades before their execution date is even scheduled.<sup>165</sup> Even though the United States provides an extensive appeals process in order to alleviate the possibility of executing the innocent and to ensure due process of law, the prolonged process takes an enormous psychological toll on the condemned.<sup>166</sup> The psychological harm and torment that death row inmates face while awaiting their execution constitutes substantial grounds to believe that they are in danger of torture, as they are often separated from the rest of the prison population.<sup>167</sup> Both courts refer to this process as the “death row phenomenon,” placing the fault on the state instead of the prisoners’ usage of the extensive appeals process.<sup>168</sup> This case law seems to suggest that even when all measures are taken to make capital punishment as humane and efficient as possible, it remains torturous in nature.

It then comes into question whether or not *Soering* and *Burns* have established binding law for other countries when faced with the possibility of extraditing individuals to a retentionist country. Certainly, for *Burns*, which was decided in a Canadian national court, the establishment of CAT protection for those facing the death penalty is binding on Canada.<sup>169</sup> In addition to finding that Canada was compelled by Article 3 of CAT to refuse extradition, the Court also condemned the death penalty as violating the Canadian Charter of Rights and

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[2001] S.C.R. 283, ¶¶ 78, 85, 94, 129 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1842/index.do> [<https://perma.cc/7J9R-7TMG>].

165. *Soering v. U.K.*, App. No. 14038/88, ¶¶ 106 (July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57619> [<https://perma.cc/8SBW-8PMN>]; *U.S. v. Burns*, [2001] S.C.R. 283, ¶ 119 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1842/index.do> [<https://perma.cc/L76P-X3XD>].

166. *Soering v. U.K.*, App. No. 14038/88, ¶¶ 106 (July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57619> [<https://perma.cc/7R95-J6YS>]; *U.S. v. Burns*, [2001] S.C.R. 283, ¶ 120 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1842/index.do> [<https://perma.cc/D9FX-SLDD>] (citing *Pratt v. Attorney General for Jamaica*, 4 All E.R. 769, 783 (Privy Council 1993) (“If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it”).

167. Moni Basu, *Death Row Diary Offers A Rare Glimpse Into A Morbid World*, CNN (June 18, 2013, 1:58 PM), <http://www.cnn.com/2013/06/14/us/florida-death-row-diary/index.html> [<https://perma.cc/JNK5-JCM8>].

168. *Soering v. U.K.*, App. No. 14038/88, ¶¶ 106 (July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57619> [<https://perma.cc/47RU-HXRT>]; *U.S. v. Burns*, [2001] S.C.R. 283, ¶ 119 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1842/index.do> [<https://perma.cc/B2WT-AV2U>].

169. Christopher Somerville et al., *Legal systems in Canada: overview*, THOMAS REUTERS PRACTICAL LAW (July 1, 2021), [https://uk.practicallaw.thomsonreuters.com/w-013-0460?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-013-0460?transitionType=Default&contextData=(sc.Default)&firstPage=true) [<https://perma.cc/TP8X-MXMD>] (last visited Aug. 18, 2021).

Freedoms.<sup>170</sup> Although the Court did not go so far as to declare executions as being unconstitutional, it did find capital punishment to constitute “cruel and unusual punishment” under Section 12 of the Charter, and also to be a breach of fundamental justice under Section 7.<sup>171</sup> The decision in *Burns* was not binding law on any other state, but by being the first to hold that another country’s capital punishment process constitutes a breach of fundamental justice and cruel and unusual punishment, *Burns* has set persuading precedent for other abolitionist countries to base their denial of extradition. Because many abolitionist states have similar constitutional provisions related to “cruel and unusual punishment” and “fundamental justice,” a national court is likely to use the same reasoning in *Burns* to set binding law in their own jurisdiction.

*Soering*, on the other hand, was decided in an international court: the European Court of Human Rights. Decisions by the European Court are non-binding, as evidenced by the UK’s refusal to recognize the Court’s decisions as binding on its government.<sup>172</sup> The only court that could be considered bound by the decisions of the European Court is the European Court itself. However, this does not mean that *Soering* was ineffectual. While the UK and other European nations may not be necessarily bound by *Soering*, they still can take the decision under consideration if confronted with the issue of extradition to a retentionist state. The fact that the majority of the world is abolitionist makes it more likely that law-binding courts will defer to the *Soering* decision. Furthermore, because *Soering* was decided in an international court, abolitionists are hopeful its reasoning will be used in influential decisions by other international courts as well. Both *Burns* and *Soering* have provided a pathway for the international recognition of CAT protection for those facing capital punishment in the United States and other retentionist states as well.

Another possible route is the “right to life” argument. Many individual countries have codified the right to life in their own domestic laws, such as Article 2 of the United Kingdom’s Human Rights Act of 1998<sup>173</sup> or the unalienable rights to “life, liberty, and the pursuit of happiness” in the United States Declaration of Independence.<sup>174</sup> However, the “right to life” line of reasoning presents challenges of its own as some retentionist

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170. U.S. v. *Burns*, [2001] S.C.R. 283, ¶ 8 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1842/index.do> [<https://perma.cc/4R5M-HEC9>].

171. *Id.* ¶ 124.

172. Jessica Elgot, *British Judges Not Bound By European Court Of Human Rights, Says Leveson*, GUARDIAN (May 24, 2015 5:46 PM), <https://www.theguardian.com/law/2015/may/24/british-courts-echr-leveson> [<https://perma.cc/VZS7-YZ76>].

173. *The Human Rights Act, Article 2: Right to Life*, EQUAL. & HUM. RTS. COMM’N, <https://www.equalityhumanrights.com/en/human-rights-act/article-2-right-life> [<https://perma.cc/MST5-N5KY>] (last visited Feb. 19, 2021).

174. THE UNITED STATES DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

states criticize abortion supporters for being hypocritical in their stance on abortion and capital punishment.<sup>175</sup> There has yet to be a judicial decision on the “right to life” as being a protection against capital punishment. Although CAT protection may currently be a criminal defendant’s best hope of evading a death sentence, the precedents discussed above fail to address racial discrimination in capital punishment.

#### IV. PROTECTION FROM THE DEATH PENALTY UNDER ASYLUM LAW

In order to be legally eligible for asylum, a person must flee their country of origin and seek protection in a host country. Upon arrival in a host country, the asylum applicant must meet the 1951 Refugee Convention’s definition of a refugee: “someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”<sup>176</sup>

Despite the CAT extradition cases, there has been little discussion on whether or not a person fleeing a possible death sentence is eligible for protection in a host country as an asylee. No country has formally granted capital punishment-based asylum, although there are a few established alternatives such as the European Union’s subsidiary protection<sup>177</sup> and the relief Edward Snowden applied for in Russia.<sup>178</sup>

In order for a capital punishment-based asylum claim to be successful, the applicant must first prove the risk of a death sentence constitutes persecution based on race, religion, nationality, membership in a particular social group, or political opinion.<sup>179</sup> Additionally, they must demonstrate that the government imposing the death penalty is complicit in that persecution, either by inaction or by actually taking part in it.<sup>180</sup> There cannot be a third country where the asylum applicant could be safe

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175. See Carol Costello, *Can You Be Pro-Life And Pro-Death Penalty?*, CNN (May 28, 2014, 4:55 PM), <http://www.cnn.com/2014/05/14/opinion/costello-pro-life-pro-death-penalty/index.html> [https://perma.cc/XJQ8-U73Y].

176. G.A. Res. 2198 (XXI), Convention and Protocol Relating to the Status of Refugees, at 3 (July 28, 1951), <https://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> [https://perma.cc/7GTC-6VSC] [hereinafter Refugee Convention].

177. Minimum Standards, *supra* note 17.

178. Toropin & Williams, *supra* note 18.

179. Refugee Convention, *supra* note 176, at 3.

180. See *Higuit v. Gonzalez*, 433 F.3d 417, 418, 421 (4th Cir. 2006) (denying the applicant’s request for asylum based on the fact that the applicant, through his work in intelligence gathering, engaged in persecution by being aware that his intelligence work lead to the persecution (torture and death) of a group of people, even if he was not directly involved); *U.S. v. Friedrich*, 402 F.3d 842, 845–46 (8th Cir. 2005) (finding that the Nazi’s position as a guard at the concentration camp still constituted complicity in the persecution).

from extradition to their death sentence.<sup>181</sup> Assuming that all of these factors are met, there are still two major issues for the applicant to overcome: whether or not they have committed a serious crime for which they were sentenced and whether or not granting them asylum would interfere with their country of origin's sovereignty.

### A. *Establishing Persecution in Capital Punishment-Based Asylum Claims*

#### 1. Persecution in Capital Punishment Abroad

In order for an asylum applicant to successfully establish persecution, they must demonstrate that they were sentenced to death or are in danger of being sentenced to death for a crime involving one of the five refugee grounds: race, religion, nationality, political opinion, or membership in a particular social group. In the United States there are no longer laws criminalizing race, religion, nationality, or political opinion; the death penalty is strictly reserved for those crimes which are regarded as the most heinous. In reality, as discussed in Part II, many of the remaining retentionist countries still employ the death penalty for crimes related to religion and membership in a particular social group, such as the LGBTQ community.

Religious opposition, renouncement, or atheism are criminalized based on institutionalized and state-mandated religious discrimination.<sup>182</sup> For individuals who are deemed to practice apostasy, blasphemy, or heresy in countries which criminalize such conduct, a state-mandated death sentence would constitute persecution based on religion. Some countries which do not formally codify laws against religious opposition still have non-secular societies that are known for extrajudicial punishment.<sup>183</sup> For instance, in 2014, a journalist was arrested on apostasy charges in Mauritania and a civilian businessman offered a reward to anyone who would execute the accused man.<sup>184</sup> A majority of

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181. Immigration and Nationality Act § 208, 8 U.S.C. § 1158(a)(2)(A) (This element is usually met where the asylum seeker is not a citizen of multiple countries).

182. See Angelina E. Theodorou, *Which Countries Still Outlaw Apostasy And Blasphemy?*, PEW RSCH. CTR. (July 29, 2016), <http://www.pewresearch.org/fact-tank/2016/07/29/which-countries-still-outlaw-apostasy-and-blasphemy/> [<https://perma.cc/35XL-MW23>]; see also *Laws Criminalizing Apostasy*, LIBR. CONG., <https://www.loc.gov/law/help/apostasy/index.php> [<https://perma.cc/W55Y-MFBP>] (last visited Feb. 19, 2021); see also Siobhan Fenton, *The 13 Countries Where Being An Atheist Is Punishable By Death*, INDEP. UK (Mar. 30, 2016 18:26 BST), <http://www.independent.co.uk/life-style/the-13-countries-where-being-an-atheist-is-punishable-by-death-a6960561.html> [<https://perma.cc/SR7L-ZKG9>] (noting that a quarter of all countries still criminalize some form of religious opposition and thirteen criminalize religious opposition as death penalty eligible).

183. Fenton, *supra* note 182.

184. *Laws Criminalizing Apostasy*, *supra* note 182.

these governments, including Mauritania, do nothing to combat extrajudicial killings,<sup>185</sup> and are therefore complicit under established asylum law. Religious persecution has long been recognized in asylum law amongst the international community. It is possible that even the United States, with its First Amendment recognizing the right to Freedom of Religion, would recognize the death penalty as a form of persecution in this scenario.

Another discriminatory crime that is widely prosecuted as a capital offense is homosexuality.<sup>186</sup> Members of the LGBTQ community have been found to constitute one of the Convention's refugee grounds under membership in a particular social group.<sup>187</sup> New Zealand recently acknowledged the reality of extrajudicial punishment for members of the LGBTQ community when it granted asylum to a British citizen who was being threatened due to their transgender identity.<sup>188</sup> Additionally, the recent U.N. Human Rights Council Resolution to abolish the death penalty for same-sex relations aimed to address this state-mandated persecution of the LGBTQ.<sup>189</sup> Both the U.N. Resolution and the recent decision in New Zealand present strong evidence that the international community is ready to recognize capital punishment for homosexuality as grounds for relief under asylum law. However, the United States' refusal to ratify the Resolution<sup>190</sup> is a significant indicator that the United States would deny any capital punishment-based asylum claims for lack of persecution.

The above trends in international law suggest that the international community and individual abolitionist states would be willing to recognize persecution in a capital punishment-based asylum claim.

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185. Fenton, *supra* note 182.

186. Pamela Duncan, *Gay Relationships Are Still Criminalized In 72 Countries, Report Finds*, GUARDIAN (July 27, 2017, 1:00 EDT), <https://www.theguardian.com/world/2017/jul/27/gay-relationships-still-criminalised-countries-report> [<https://perma.cc/9HMY-PJGK>] (noting there are approximately seventy-two countries which still criminalize same-sex relations); *see also* AENGUS CARROLL & LUCAS RAMON MENDOS, STATE SPONSORED HOMOPHOBIA, INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N 40 (12th ed., 2017), [https://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf) [<https://perma.cc/4PS7-HP3U>] (noting in eight countries, these crimes are subject to punishment via death sentence and in some cases a death sentence is mandatory).

187. *See Amanfi v. Ashcroft*, 328 F.3d 719, 727–30 (3d Cir. 2003) (recognizing homosexuals as a particular social group with a well-founded fear of extrajudicial killings at the hands of the public).

188. Mayer Nissim, *British Transgender Woman Gets Asylum In New Zealand Because Of Persecution In The UK*, PINK NEWS (Oct. 12, 2017, 3:34 PM), <http://www.pinknews.co.uk/2017/10/12/british-transgender-woman-gets-asylum-in-new-zealand-because-of-persecution-in-the-uk/> [<https://perma.cc/B53U-775K>].

189. HRC Res. 36/6, *supra* note 138, at 3.

190. HRC Staff, *supra* note 139.

## 2. Persecution in Capital Punishment in the United States

As previously discussed in Part II.B, racial disparity has become characteristic of capital punishment in the United States and the entire criminal justice process. Black Americans and other minorities are disproportionately policed, arrested, detained, convicted to harsher sentences, condemned to death, and ultimately executed. In light of the global outrage surrounding these racial disparities, sparked by numerous murders of unarmed Black Americans in 2020, the likelihood of recognition of state-sponsored persecution in capital punishment is perhaps more likely than ever.

A minority fleeing the United States under a reasonable belief that they will be sentenced to death, or a minority who by some chance has escaped death row after a capital conviction, may have a valid persecution claim. Their argument rests on the plethora of empirical data demonstrating that they would have a better chance of being sentenced to life if not for their racial membership in a minority group, particularly for Black Americans. The United States was keenly aware of this racial disparity when it temporarily abolished the death penalty in 1972.<sup>191</sup> Although, upon the reinstatement of the death penalty in 1976, the United States attempted to fix this violation of both the Constitution and international law by employing race-neutral policies that failed to address these pervasive racial issues.<sup>192</sup> The abundance of statistics and annual reports on the issue of racial disparity make it impossible for the United States government to plead ignorance on the subject, especially when many of these findings were conducted by the federal Census Bureau.<sup>193</sup> Senator Russ Feingold said in front of the 108th Congress in January 2003 that “We simply cannot say we live in a country that offers equal justice to all Americans when racial disparities plague the system by which our society imposes the ultimate punishment.”<sup>194</sup> The United States not only directly conducts the racial persecution demonstrated in its death row facilities, but it is also complicit by not fixing this pervasive problem despite its awareness of these gross disparities. For these reasons, a racial minority fleeing the United States’ capital punishment system has a valid claim of persecution, although this relief may be granted on a case-by-case basis for reasons discussed in the next section.

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191. *Furman*, 408 U.S. at 310 (Brennan, J., concurring) (stating “My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”).

192. *Gregg*, 428 U.S. at 166–68.

193. See generally DOJ REPORT 2010, *supra* note 74; CENSUS BRIEF 2010, *supra* note 74; DOJ REPORT 2013, *supra* note 74; DOJ REPORT 2015, *supra* note 57; DOJ REPORT 2018, *supra* note 75; DOJ Table 43A, *supra* note 77.

194. Death Penalty and Race, *supra* note 16.

White Americans as a group are unlikely to be recognized as victims of persecution in the administration of capital punishment due to the absence of reputable evidence that they experience harmful racial disparities in the criminal justice process *because* of race or any of the other recognized refugee grounds under the Convention. Their best chance for acknowledging the violation of their human rights under capital punishment is CAT relief as discussed in *Burns* and *Soering*.

### B. Major Obstacles to U.S. Capital Punishment-Based Asylum Claims

Assuming that an individual met the Convention definition of a refugee and was able to flee a retentionist country, either pre- or post-conviction, there are still two major issues that the individual would have to overcome before a host country could provide protection: bars to asylum for criminals and state sovereignty. However, with questions surrounding whether “non-refoulement” is binding customary law, the tendency of European courts to adhere to this notion may determine the successful outcome of capital punishment-based asylum relief.

#### 1. Criminal Bars to Asylum

The first issue involves the suspicion of the applicant having committed a particularly serious crime. Commission of such a crime bars eligibility not only to asylum, but for many forms of immigration relief.<sup>195</sup> Particularly serious crimes include crimes of violence, drug offenses, sexual misconduct, possession of firearms, and fraud, among many others.<sup>196</sup> For some crimes, even a misdemeanor conviction is enough to bar asylum relief.<sup>197</sup> These bars are in place for obvious reasons of national security and protection of the host country’s citizens.

This presents a major problem for capital punishment-based asylum claims because every applicant is either suspected of having committed a crime or has already been convicted. Many retentionist countries other than the U.S. punish capital crimes that a majority of host countries would not view as serious crimes or, in some cases, crimes at all. Some examples of these lesser capital crimes have already been discussed, including religious opposition, homosexuality, and some drug offenses (such as the

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195. See Appendix F “Particularly Serious Crime” Bars on Asylum and Withholding of Removal: Case Law Standards and Sample Determinations, U.N. HIGH COMM’R RTS (Jan. 2011), <http://www.unhcr.org/en-us/protection/migration/58f900cd4/particularly-serious-crime-bars-on-asylum.html> [<https://perma.cc/F9B7-53MG>] [hereinafter *Particularly Serious Crimes*]; see also *Asylum Bars*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-bars#:~:text=Bars%20from%20a%20Grant%20of,social%20group%2C%20or%20political%20opinion> [<https://perma.cc/9V7N-GJYY>] (last visited Mar. 13, 2021).

196. See sources *supra* note 195.

197. *Particularly Serious Crimes*, *supra* note 195 (noting that many sexual assault misdemeanors are an automatic bar).

case of Laura Plummer), among many others. Capital punishment-based asylum claims based on these crimes would likely pass the particularly serious crime bar.

This issue becomes more problematic for many potential asylum applicants from the U.S. where capital punishment is reserved for only the “most serious crimes” in accordance with Article 6 of the ICCPR.<sup>198</sup> It seems that the serious crime bar would block individuals sentenced to death on murder charges from asylum relief, but that conclusion is not so easily reached as it may appear. Because of the risk of condemning the innocent, mitigating circumstances that are favorable to the defendant may persuade a host country to waive the serious crime bar; however, a host country would not have the jurisdiction to re-adjudicate a conviction.<sup>199</sup>

For reasons of national security, host countries may be hesitant to grant discretionary asylum to those whose cases have yet to be fully adjudicated and/or acquitted; the host country would be unable to adjudicate the case itself and would not be able to detain the suspect without a conviction. However, the CAT decisions of *Soering* and *Burns* seem to suggest that serious crimes may not be a major deterrent. Neither *Soering* nor *Burns* took into consideration whether or not the individuals were barred from CAT protection due to the fact that they may have committed capital murder in the United States. However, the ultimate outcome of both of these cases ended in the extradition of the defendants, leaving unanswered the question of whether the host state would allow a death penalty-asylee to remain without a trial. Due to the fact that asylum is a discretionary form of relief, prospective host countries may be more inclined to reserve protection to those cases that present significant questions of innocence or where assurances from the U.S. are not obtained.

## 2. Asylum Infringing on State Sovereignty

The concept of state sovereignty formed the current world order as well as the development of international law.<sup>200</sup> Sovereignty

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198. INTERNATIONAL COMMISSION AGAINST THE DEATH PENALTY, *THE DEATH PENALTY AND THE “MOST SERIOUS CRIMES”* (Jan. 2013) (citing Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/4/20, 29 Jan. 2007 para. 39–53, 65) (The U.S. reserves the death penalty for cases of capital murder “where it can be shown that there was an intention to kill, which resulted in the loss of life.”).

199. U.S. v. *Burns*, [2001] S.C.R. 283, 288 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1842/index.do> [<https://perma.cc/XR2L-24MV>] (referring to the concern for wrongful conviction in the *Burns* decision).

200. Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT’L HISTORY REV. 569, 570–71 (1999) (The treaty of Westphalia in 1648 established the concept of state sovereignty as meaning that a state has absolute power to govern and control domestic affairs within its territory.).



encompasses a state's power to structure and operate its own criminal justice system.<sup>201</sup> This concept presents a potential defense against universal abolition for the United States and other retentionist states.

For potential host countries of capital punishment-based asylees, granting such relief would directly challenge the country of origin's state sovereignty to operate its own criminal justice system and punish crimes as it sees fit. The U.N. General Assembly addressed the foreign tensions that recognizing refugees and granting asylum protection would create when it adopted the Declaration on Territorial Asylum.<sup>202</sup> The Declaration emphasized that granting asylum should not be viewed as an act of hostility, but rather of cooperation with the rest of the international community.<sup>203</sup> Even so, the prospect of interfering with the sovereignty of another country, particularly the United States, would likely deter many host countries from granting asylum for these claims.

Granting asylum to a national from the United States, could be a damaging decision. Other states may be hesitant to back such a decision and choose instead to stand in solidarity with the United States in order to maintain a positive and beneficial relationship. Hostility between the United States and its allies may not be in the best interests of the host country. The tension could grow to affect reputation, trade, international treaties, and could leave the host country without support from the international community. For example, in the past the U.S. has sanctioned countries such as Belarus, Ukraine, and Lebanon when their actions were determined to be undermining U.S. democracy.<sup>204</sup> Granting asylum to an applicant fleeing U.S. capital punishment could also be interpreted as such an act to undermine American democracy. Therefore, it is ultimately the obstacle of state sovereignty that may halt the granting of capital punishment-based asylum for an American national.

However, there is an argument that the United States and other retentionists gave up, in part, their absolute sovereignty in conducting criminal justice by ratifying the ICCPR and CAT while continuing to maintain arbitrary and discriminatory capital punishment systems. By signing these two multilateral treaties, a state voluntarily pledges to join the other signing countries and make a commitment to address the human rights issues surrounding capital punishment. To allow signing states to freely back out of such international commitments is detrimental to the

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201. MAARTEN DEN HEIJER, *EUROPE AND EXTRATERRITORIAL ASYLUM* (2011).

202. Guy S. Goodwin-Gill, *The 1967 Declaration on Territorial Asylum*, UN AUDIOVISUAL LIB. OF INT'L L. (Dec. 14, 1967), <https://legal.un.org/avl/ha/dta/dta.html> [<https://perma.cc/CY3Y-VM2F>].

203. See generally, *id.* at 1, 7.

204. See *Sanctions Programs and Country Information*, U.S. DEP'T TREASURY, <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> [<https://perma.cc/2JHD-KHW7>] (last visited Feb. 19, 2021).

integrity of international bodies, like the United Nations, and further detrimental to the countless other multilateral treaties that have been accomplished since the dawn of international relations. The case *Al Saadan v. United Kingdom* considered this question, where the European Court of Human Rights was unpersuaded by notions of state sovereignty and found that the United Kingdom had a duty under the above treaties to interfere with the Iraqi criminal justice system by ensuring the two Iraqi's suspected of murder would be given fair and just trials.<sup>205</sup>

As universal abolition and attention to racial disparities continues to grow, the issue of insulting U.S. sovereignty may hold little deterrence, and the international community may be more likely to stand in solidarity against the United States once and for all for its complacency in discriminatory capital punishment practices.

### 3. Non-Refoulement

“Non-refoulement,” established in the 1951 Refugee Convention, means that host countries have a duty not to return refugees to their country of origin where the persecution took place.<sup>206</sup> Whether or not “non-refoulement” is binding on States who ratified either the 1951 Convention or the 1967 Refugee Protocol is still left up for debate. For instance, in *Sale v. Haitian Centers Council, Inc.* the United States Supreme Court found an exception to non-refoulement by determining that the concept did not apply to the U.S. Coast Guard operating on the high seas.<sup>207</sup>

European courts have been more willing to conform to “non-refoulement.” In *D. v. United Kingdom*, the European Court of Human Rights found that the United Kingdom could not return the individual without violating “non-refoulement” and the individual’s right to life due to the lack of medical technology necessary to treat AIDS.<sup>208</sup> Similarly, in *Hirsi v. Italy* the Court found that the Italian Coast Guard violated “non-refoulement” by returning Somali and Eritrean refugees to Libya, a known human rights violator.<sup>209</sup> *D. v. United Kingdom*, and *Hirsi* demonstrate that Europe tends to sway towards the enforcement of “non-refoulement” in the struggle between human rights and state sovereignty.

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205. *Al Saadon and Mufdhi v. U.K.*, App. No. 61498/08, ¶ 115, 138–39 (June 30, 2009), <http://hudoc.echr.coe.int/eng?i=001-97575> [<https://perma.cc/G5H9-YMXS>] (noting the European Court found that members of the Council of Europe had an obligation to uphold basic international values, primarily the right to life).

206. Refugee Convention, *supra* note 176, art. 33(1).

207. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187–88 (1993).

208. *D. v. U.K.*, App. No. 30240/96, ¶¶ 52–54 (May 2, 1997), <http://hudoc.echr.coe.int/fre?i=001-58035> [<https://perma.cc/7ZSQ-ZYAE>].

209. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, ¶¶ 11–12, 40–44, and ¶¶ 6–7 at 57 (Feb. 23, 2012), <http://hudoc.echr.coe.int/eng?i=001-109231> [<https://perma.cc/5MNJ-B9SW>].

It is possible that if faced with a capital punishment-based asylum claim from the United States the European Court of Human Rights would rule no differently from these precedents and would grant such relief. In the aftermath of the events of 2020, with the racial disparities of the U.S. criminal justice system under the microscope for the world to see and with the absence of effective government reforms that address these disparities, it is certainly possible that a host country would prioritize these willful human rights violations above all else.

### CONCLUSION

Ban Ki-moon, the former Secretary-General of the United Nations, has declared that “the death penalty has no place in the 21st century” and also vowed to never stop fighting for capital punishment’s universal abolition.<sup>210</sup> Ban Ki-moon’s statements seem to reflect the general attitude of the international community. The fact is that more countries abolish the death penalty each year, as more research reveals that “those who are poor, mentally disabled, and/or are minorities are at higher risk of receiving the death sentence, regardless of guilt or innocence.”<sup>211</sup> As the international community progresses into the 21st century, more cases following the logic of *Soering* and *Burns* are bound to emerge and become binding customary law.

Additionally, the world is likely to see the emergence of case law in regard to asylum as well, as the international community begins to hold retentionist countries responsible for persecution in criminal justice. While the United States and other retentionist countries are stubbornly clinging onto their sovereignty in utilizing capital punishment, their slogan of retribution and deterrence grows more obsolete in the eyes of the international community as it continues to push for universal abolition. The CAT extradition cases and recognition of capital punishment-based asylees are tools with which the international community can take a stand against universal abolition’s biggest opponent, the United States, and finally achieve this long-awaited goal.

Although the new Biden administration in the United States promises to address racial disparities in the criminal justice process, discussions of abolishing the death penalty or, at a minimum, addressing racial discrimination in capital sentences remains largely absent from mainstream reform agendas. While there is hope that addressing racial

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210. “Death penalty has no place in the 21<sup>st</sup> century,” declares UN chief, U.N. NEWS (July 2, 2014), <https://news.un.org/en/story/2014/07/472282-death-penalty-has-no-place-21st-century-declares-un-chief> [<https://perma.cc/C8D8-56EX>] (last visited Aug. 19, 2021). “I will never stop calling for an end to the death penalty,” Ban Vows at Launch of New UN Publication, U.N. NEWS (Nov. 5, 2015), <http://www.un.org/apps/news/story.asp?NewsID=52474#.WhIjAraZPBI> [<https://perma.cc/KSF6-M38Q>] (last visited Aug. 18, 2021).

211. *Id.*

disparities at the other stages of the criminal justice process will transcend into the administration of capital sentences, this potential is meaningless to the inevitable innocent inmates who are currently sitting on death row; this potential is equally meaningless to the disproportionate numbers of minorities who sit on death row for crimes for which their white counterparts received life sentences. Amnesty International Secretary-General Salil Shetty's comment that "China wants to be a leader on the world stage, but when it comes to the death penalty it is leading in the worst possible way"<sup>212</sup> is eerily relevant to the United States as well, as it continues to proclaim itself the leader of the free world while simultaneously sentencing its own citizens to death in a deeply flawed criminal justice system.

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212. *World's Biggest Executioner*, *supra* note 103.